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James W. Clark

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES W. CLARK,
SHAWN E. JENKINS, and
JULIE W. TRUSOCK,

Appeal 2009-001184
Application 10/027,791
Technology Center 1700

Decided: September 22, 2009

Before CATHERINE Q. TIMM, JEFFREY T. SMITH and
LINDA M. GAUDETTE, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

Statement of the Case

This is an appeal under 35 U.S.C. § 134 from a final rejection of claims 27-38, 50, 51, 53, 54, 56-58, 60-71, and 73-81. We have jurisdiction under 35 U.S.C. § 6.

Appellants' invention relates to a wiper comprising a nonwoven fabric and a sanitizing formulation. Representative independent claim 27, as presented in the Brief, but with some formatting changes, appears below:

27. A wiper comprising a nonwoven fabric and a sanitizing formulation applied to said nonwoven fabric in an amount from about 150% to about 600% of the dry weight of the wiper, said sanitizing formulation comprising a surfactant component that consists essentially of one or more nonionic surfactants, and said sanitizing formulation further comprising between about 0.01% by weight to about 0.4% by weight of at least one benzalkonium halide, wherein said sanitizing formulation has a pH of greater than about 8 and is configured so that said formulation is released from said nonwoven fabric as a solution during use of the wiper in food service applications, said benzalkonium halide being present within said released solution in an amount less than about 2000 parts per million of said released solution, and wherein the wiper exhibits a log reduction for *E Coli*, *S. Aureus*, or both of at least about 3 and a Kill Efficiency Ratio for *E. Coli*, *S. Aureus*, or both of at least about 40.

Appellants appeal the following rejection:

Claims 27-38, 50, 51, 53, 54, 56-58, 60-71, and 73-81 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Sherry, U.S. Patent No. 6,716,805 B1 issued April 6, 2004.

Appellants have the burden on appeal to the Board of demonstrating error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) (“On appeal to the Board, an applicant can overcome a rejection [under § 103] by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness.”) (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir.

1998)). Therefore, we look to Appellants' Brief to show error in the proffered prima facie case. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2007).

A claimed invention is unpatentable if the differences between it and the prior art "are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art." 35 U.S.C. § 103. "The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 415-16 (2007). The question to be asked is "whether the improvement is more than the predictable use of prior art elements according to their established functions." *Id.* at 417.

For a prima facie case of obviousness to be established, however, references need not recognize the problem solved by the appellants. *See In re Kemps*, 97 F.3d 1427, 1430 (Fed. Cir. 1996); *In re Beattie*, 974 F.2d 1309, 1312 (Fed. Cir. 1992).

Based on the contentions of the Examiner and the Appellants, the issue presented for our review is: have Appellants shown reversible error in the Examiner's determination that it would have been obvious to a person of ordinary skill in the art to formulate a wiper comprising benzalkonium halide where the bezalkonium halide is present in a released solution in the amounts required by the claimed invention?¹

¹ In response to the stated rejection, Appellants' arguments are directed towards claims 27 and 35 together as a group. Appellants have not argued the merits of the dependent claims. Therefore, the rejected claims will stand or fall with independent claim 27. 37 C.F.R. § 41.37(c)(1).

Appellants have not disputed the Examiner's conclusion that it would have been obvious to a person of ordinary skill in the art to formulate a wiper comprising benzalkonium halide in a released solution of the wiper based on the teachings of Sherry. (*See generally* Briefs). Rather Appellants' principle argument is that

Sherry, et al. completely fails to recognize that it is beneficial to control and minimize of [sic] benzalkonium halide content within that released solution. As explained by the present application, such control of the amount of benzalkonium halide within the released solution is especially important during use of the wiper in food surface applications. Thus, Applicants respectfully submit that Sherry, et al. does not disclose or suggest all of the limitations of independent claims 27 and 35.

(App. Br. 7). Appellants also argue that Sherry fails to teach or suggest a wiper having a released solution containing less than about 2000 ppm of benzalkonium halide while obtaining the claimed Kill Efficiency Ratio and obtaining a log reduction for E. Coli, S. Aureus, or both as specified by the independent claims. (App. Br. 6-7). Appellants further argue that Sherry teaches away from the claimed invention. (App. Br. 8).

Sherry discloses suitable anti-microbial actives for the wipes include didecyl dimethyl ammonium chloride, C₁₂, C₁₄ and C₁₆ dimethyl benzyl (Bardac®2280). Sherry discloses the wipes comprise anti-microbial actives in amounts from about 0.001% to about 0.1%. Sherry discloses that a person of ordinary skill in the art would select specific anti-microbial actives so as to be effective against specific bacteria. Sherry discloses the anti-microbial actives are chosen to have residual disinfectant benefits against more than one bacterial organism, and more preferably against at least one

gram-negative organism and at least one gram-positive organism. (Col. 37, l. 64- col. 38, l. 28).

As set forth above, Sherry discloses the anti-microbial actives can be present in very low amounts. Appellants have not argued that these amounts are outside the scope of the claimed invention. Contrary to Appellants' arguments, there is no need for the Sherry reference to recognize Appellants' reason for minimizing the anti-microbial actives. Appellants' arguments regarding the Kill Efficiency Ratio and a log reduction for E. Coli, S. Aureus properties are not persuasive because they appear to be based upon the amount of benzalkonium halide anti-microbial actives present in the release solution which is described and/or suggested by Sherry. It is well within the ambit of one of ordinary skill in the art to employ appropriate amounts of benzalkonium halide antimicrobial actives including the claimed amounts in forming the wipes as suggested by Sherry. *In re Boesch*, 617 F.2d 272, 276 (CCPA 1980) (“[D]iscovery of an optimum value of a result effective variable in a known process is ordinarily within the skill of the art.”); *In re Aller*, 220 F.2d 454, 456 (CCPA 1955) (“[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation”).

In conclusion, based on the foregoing and the reasons well stated by the Examiner, the Examiner's decision rejecting the appealed claims is affirmed.

ORDER

The rejection of claims 27-38, 50, 51, 53, 54, 56-58, 60-71, and 73-81 under 35 U.S.C. § 103 as set forth in the stated rejection is affirmed.

Appeal 2009-001184
Application 10/027,791

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(v).

AFFIRMED

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